

JAMES M. CHUDNOW

IBLA 81-969

Decided September 16, 1982

Appeal from decision of Arizona State Office, Bureau of Land Management, rejecting noncompetitive over-the-counter oil and gas lease offer A-16802.

Affirmed in part; set aside and remanded in part.

1. Oil and Gas Leases: Lands Subject to

Land included in an outstanding oil and gas lease is not available for leasing and an oil and gas lease offer filed for such land must be rejected whether or not the outstanding lease was properly issued as to that land.

2. Oil and Gas Leases: Applications: 640-Acre Limitation

BLM may not reject an oil and gas lease offer, as violating the 640-acre rule embodied in 43 CFR 3110.1-3(a), where a disqualifying portion of the land sought was covered by an outstanding oil and gas lease at the time the offer was filed but this fact was not boted in the appropriate public land records.

APPEARANCES: James M. Chudnow, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

James M. Chudnow has appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated August 4, 1981, rejecting noncompetitive over-the-counter oil and gas lease offer, A-16802, which he and one Laurent A. Giesbert had filed on May 8, 1981. 1/

1/ While appellant Chudnow purports to represent his co-offeror in this appeal, we note that the status of an attorney-in-fact does not authorize Chudnow to represent Giesbert before this Board. See generally 43 CFR Part 1.

On May 8, 1981, appellant and Giesbert filed an oil and gas lease offer for 760 acres of land situated in the SE 1/4 sec. 6, T. 6 N., R. 18 W., and the N 1/2 N 1/2, SW 1/4 NW 1/4, W 1/2 SW 1/4 sec. 9, N 1/2 N 1/2 sec. 29, and N 1/2 N 1/2 sec. 36, T. 7 N., R. 19 W., Gila and Salt River meridian, Arizona. In its August 1981 decision, BLM rejected appellant's lease offer because a portion of the acreage sought, *i.e.*, the SE 1/4 sec. 6, T. 6 N., R. 18 W., was embraced in an outstanding oil and gas lease (A-13711) and because the remaining acreage aggregated less than 640 acres, and was abutted by lands available for leasing when the instant offer was filed.

In his statement of reasons for appeal, appellant states that prior to filing the oil and gas lease offer, he attempted to ascertain the status of any land which might be included in the offer. He notes that "in early May [1981]" he reviewed the oil and gas plat for T. 6 N., R. 18 W., which indicated that the SE 1/4 sec. 6 was not included in lease A-13711 and was available for leasing. This was confirmed by the serial register page for A-13711. Chudnow argues that it was not until his offer was filed that either of these documents were changed to correctly reflect the land status. Indeed, Chudnow states that after he received notice of the rejection of his lease offer, two BLM employees told him over the phone that the serial register page still did not include the SE 1/4 sec. 6 in lease A-13711. Appellant concludes that he should not be penalized for any BLM errors in noting the extent of lease A-13711 and should at least receive a lease for the remaining acreage sought in T. 7 N., R. 19 W., Gila and Salt River meridian, Arizona.

A careful review of the record indicates that the SE 1/4 sec. 6, T. 6 N., R. 18 W., Gila and Salt River meridian, Arizona, was, indeed, included in oil and gas lease A-13711, but that this fact was not properly noted in the public land records for some period of time. On March 19, 1981, a noncompetitive over-the-counter offer was filed with BLM by Stuart Lydick, for certain land situated in secs. 1-7, T. 6 N., R. 18 W., Gila and Salt River meridian, Arizona. The total acreage requested was 2,356 acres. The offer was assigned serial number A-13711. The lands requested in sec. 6 were set forth, as follows: "Sec. 6: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, SE 1/4 NW 1/4, E 1/2 SW 1/4, S 1/2 NE 1/4 (All)." On March 23, 1981, the lease was approved by the Chief, Branch of Lands and Minerals Operations, BLM, with an effective date of April 1, 1981. The land included in the lease by BLM was identical to the land requested by the offeror, except for the addition of the SE 1/4 to sec. 6. In so doing, BLM had apparently chosen to conform the land description to the presumed intention of the offeror, based on the fact that the offeror had used the word "(All)" in his description of the land requested in sec. 6, though he had not specifically delineated the SE 1/4, and the total acreage figure of 2,356 acres, shown in the offer, could only be achieved by inclusion of the 160 acres in the SE 1/4 sec. 6.

The record, however, contains two copies of the oil and gas plat for T. 6 N., R. 18 W., Gila and Salt River meridian, Arizona. In the first copy, the SE 1/4 sec. 6 is clearly delineated as not included in oil and gas lease application A-13711. 2/ In the second copy, the original reference lines

2/ The notation on the plat reads "A 13711 OG Lse Apln."

have apparently been whited out and new lines drawn to include the SE 1/4 sec. 6 in oil and gas lease A-13711. In addition, appellant has submitted a copy of the serial register page for oil and gas lease A-13711, which he obtained from BLM. The copy clearly indicates that the words "SE 1/4 (all)" had been added to the description of land leased in sec. 6, T. 6 N., R. 18 W., sometime after the original entry had been made. Thus, not only is the "SE 1/4 (all)" not on the same line as the rest of the entry, but a partially whited out semicolon is still clearly visible following the entry of the "S 1/2 NE 1/4."

The record, therefore, supports appellant's contention that when the land requested by Stuart Lydick under oil and gas lease offer A-13711 was originally noted on the oil and gas plat for T. 6 N., R. 18 W., and in the serial register, the SE 1/4 sec. 6 was omitted. This land was subsequently added to the land included in the lease issued to Lydick. However, it is not clear when the public land records were changed to reflect that fact.

[1] It is well established that land included in an outstanding oil and gas lease is not available for leasing and that an oil and gas lease offer filed for such land must be rejected. Curtis D. Wheeler, 55 IBLA 278 (1981), and cases cited therein. It is clear that the SE 1/4 sec. 6, T. 6 N., R. 18 W., Gila and Salt River meridian, Arizona, included in appellant's lease offer, was also included in oil and gas lease A-13711, when that lease issued.

The description of land requested by Lydick in his lease offer did not include the SE 1/4 sec. 6. However, as noted above, it was fairly clear that Lydick intended to include that quarter section. Nevertheless, as we have stated on numerous occasions, BLM is without authority to alter, modify, or correct erroneous land descriptions in lease offers or to construe ambiguities therein in such a way so as to make them acceptable. See, e.g., Bob G. Howell, 63 IBLA 156 (1982), and cases cited therein. This holding applies even where BLM can probably make an accurate guess as to the correct nature of a land description. Mountain Fuel Supply Co., 13 IBLA 85 (1973). The proper course of action would have been to have Lydick file another offer clarifying his intent. ^{3/} His priority would have dated from the submission of his second offer. Since, however, the record before us indicates that there were no conflicting offers filed prior to actual lease issuance, we find that the latent ambiguity in the offer does not vitiate the efficacy of lease A-13711 as to the SE 1/4 sec. 6.

In any case, when issued, oil and gas lease A-13711 specifically included the SE 1/4 sec. 6, and even were it defective to the extent that it included such land, it, nevertheless, segregated that land from further

^{3/} Had Lydick described all of the land in sec. 6, T. 6 N., R. 18 W., and then included the word "(All)," we would conclude that the description was proper. See James M. Chudnow, 62 IBLA 19 (1982). However, the omission of the SE 1/4 in the description of sec. 6 created an ambiguity which BLM was without authority to resolve.

oil and gas leasing. George E. Conley, 1 IBLA 227 (1971). Accordingly, we conclude that BLM properly rejected appellant's lease offer as to the SE 1/4 sec. 6, T. 6 N., R. 18 W., Gila and Salt River meridian, Arizona.

The next question is whether appellant violated the 640-acre rule when he filed a lease offer for 760 acres of land, where 160 acres of the land embraced in the offer was not available for leasing. The 640-acre rule is embodied in 43 CFR 3110.1-3(a), which provides:

No offer may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan has been approved as to form by the Director of the Geological Survey or where the land is surrounded by lands not available for leasing under the Act.

It is well established that where a portion of the land included in an oil and gas lease offer is unavailable at the time the offer is filed, such that the total acreage of available land falls below 640 acres, the offer must be rejected unless one of the exceptions in 43 CFR 3110.1-3(a) applies. Nova L. Dodgen, 54 IBLA 340 (1981), and cases cited therein. In the present case, neither of the exceptions applies. There is no evidence that the land sought by appellant is included in an approved unit or cooperative plan of operation. In addition, the oil and gas plat for T. 7 N., R. 19 W., Gila and Salt River meridian, Arizona, indicates that there were lands contiguous to each of the other parcels which were available for leasing when appellant filed his lease offer. Indeed, appellant admits that he would have filed "for at least 640 acres" in T. 7 N., R. 19 W., if he had known that the SE 1/4 sec. 6, T. 6 N., R. 18 W., was not available for leasing.

Nevertheless, we conclude that appellant did not violate the 640-acre rule where the public land records at the time the offer was filed indicated that all of the 760 acres which he requested were available for leasing.

We do not view this conclusion as inconsistent with the purposes behind the 640-acre rule. In Annie Dell Wheatley, 62 I.D. 292 (1955), the Acting Solicitor discussed the genesis of the Departmental regulation which first embodied the 640-acre rule, 43 CFR 192.42(d) (17 FR 5615 (July 21, 1952)). He noted that:

[T]he regulation was adopted as the result of widespread advertising by promoters that members of the public could secure 40-acre oil and gas leases for sums ranging from \$50 to \$100 or more. The filing fee and first year's rental on a 40-acre lease amounted to only \$30. Oil and gas filings increased as much as 42 to 60 percent in some land offices as a result of the advertising. The result was a slow down in the processing of applications not induced by the advertising, with the prospect of even greater delays as the 40-acre filings mushroomed. Moreover, as the issuance of 40-acre leases increased, so would the difficulties of an operator attempting to assemble acreage for development

purposes increase. Instead of contacting one lessee for a section of land an operator might have to deal with 16 lessees scattered over the United States. The difficulties of attempting to assemble a large block of acreage under these conditions would be enormous, and would definitely impede the development of the public lands. Furthermore, not only did the 40-acre filings cause a substantial administrative burden in processing the filings but it could be anticipated that in the future, with most of the lessees being pure speculators, there would be defaults in rentals leading to substantial administrative work in attempting to clear up lease accounts and records.

Id. at 293-94. Thus, the 640-acre rule was intended to lessen the administrative burden attendant to leasing small units and to promote the proper development of the public lands. We do not believe that these purposes are in any way contravened in the case of an offeror who, in reliance on public land records, has applied for acreage clearly in excess of 640 acres, but the records are subsequently determined to be erroneous such that a disqualifying portion of the acreage is found to be unavailable for leasing.

As stated in L. E. Linck, 67 I.D. 113, 115 (1960):

The Department has been alert to attempts to circumvent the rule and has indicated plainly that it will not permit practices which could lead to evasion of the rule. Natalie Z. Shell, 62 I.D. 417, 419 (1955); Halvor F. Holbeck, 63 I.D. 102 (1956); Janis M. Koslosky, 66 I.D. 384 (1959).

Thus, in Natalie Z. Shell, supra, the Department rejected an argument that a lease application segregates the land, noting that such a rule would permit an offeror to file one application for quarter-quarter sections in a checkerboard fashion, aggregating 640 acres, and then file individual applications for each interspersed quarter-quarter section on the ground that the later applications included isolated tracts and so fell within the second exception of the 640-acre rule.

Similarly, in Halvor F. Holbeck, supra, the Department held that an offer was properly rejected where the offeror filed for 640 acres and then voluntarily withdrew a portion of the acreage, bringing it below 640 acres. The Solicitor stated: "Obviously the purpose of the regulation would be largely defeated if an offeror, after filing for 640 acres or more, could immediately reduce his acreage to less than 640 acres by withdrawing acreage from his offer." Id. at 104-05.

Moreover, the 640-acre rule has been applied equally in cases where there was no intent to evade the rule, as well as in those cases where the attempt to evade was deliberate. Accordingly, in L. E. Linck, supra, the Department held that where a portion of the land sought was not properly described in the lease offer, such that the offer was subject to rejection as to that land, and the remainder of the offer for adjacent lands no longer aggregated 640 acres, that remaining portion must be rejected as in violation of the 640-acre rule. The Deputy Solicitor stated:

If the argument of appellant were accepted, the door would be opened to a simple way of evading the 640-acre rule. An offeror could apply for the land he wants (less than 640 acres) and then include in his offer sufficient additional land to make a total of 640 or more acres but deliberately misdescribe the additional land so that his offer would be rejected as to that land. The misdescription could take the form of describing surveyed lands by metes and bounds or unsurveyed lands by metes and bounds that do not close, etc. The Department cannot allow any such practices (which, of course, do not comport with the regulations) even though there is no intent to evade the 640-acre rule. [Emphasis added.]

Id. at 115-6.

In Janis M. Koslosky, supra, the offeror had applied for unsurveyed land, a portion of which, when the land description was plotted by the land office manager, was determined to have been withdrawn from mineral leasing. The remainder of the land sought was less than 640 acres. The Department held that an oil and gas lease offer was properly rejected where the offer included land which the offeror knew or "should have known" was withdrawn and the remaining offer violated the 640-acre rule. Id. at 387.

In the present case, there is no evidence that appellant intended to evade the 640-acre rule. In fact, the uncontroverted assertions made by appellant establish that the offerors in good faith relied on the public land records as to the availability of the land sought for oil and gas leasing. However, as we have pointed out, the 640-acre rule applies regardless of the intent of the offeror. Nevertheless, the rule is not absolute. One important exception was noted in Empire State Oil Co., 71 I.D. 92 (1964), which involved the question of compliance with the 640-acre rule in situations involving lands within a known geologic structure (KGS) of a producing oil or gas field.

In Empire, supra, the appellant had filed an offer to lease which contained 640 acres, of which, however, 120 acres were in a KGS and, thus, not available for noncompetitive lease. Appellant eventually received a lease for 120 acres of land which had not been within a KGS. One Jack J. Grynberg, who had also filed on the land eventually leased, appealed rejection of his offer on the ground that Empire's offer violated the 640-acre rule by including 120 acres of land which were not available for leasing at the same time that other adjacent acreage was available but not included in Empire's offer. In affirming the decision of the Division of Appeals, BLM, directing cancellation of Empire's lease, the Assistant Solicitor for Public Lands held that so long as adjacent land was available, compliance with the 640-acre rule could only be shown where the land embraced by the offer was available for noncompetitive leasing.

In this decision the Assistant Solicitor reviewed at length the various rules determining availability of land for the purposes of the 640-acre rule. Thus, lands under lease or withdrawn from leasing could not be counted, whereas lands merely covered by pending offers could be. The opinion noted,

however, that there was one important difference between the above situations and that which arose in KGS determinations:

In all of the foregoing situations, the information upon which a determination is made as to whether or not the lands are available for leasing is a matter of record in the Bureau of Land Management and is discernible to any prospective lease offeror. This is not necessarily so with respect to lands within a known geologic structure.

Id. at 96. The reason that this is not so with respect to KGS determinations is that, under long standing rules, a KGS determination is effective not when a pronouncement to that effect is made, but rather when the underlying facts which determine the producing character of a geologic structure are ascertained.

Two distinct possibilities arise because of this rule. First, an offeror could file for lands which, at the time of filing, are shown by the records to be within a KGS, but which have been determined by Geological Survey to no longer be in the KGS. Second, an offeror could file for lands which, at the time of filing, are shown by the records as not within a KGS, but which have been determined to be within one. The Assistant Solicitor ruled that in both cases, the status of the land, as reflected in the BLM records when the offer was filed, would control for purposes of counting acreage to determine compliance with the 640-acre rule. Id. at 97-98.

We think this principle is controlling herein. In other words, if the land status records of which an individual offeror can be said to have constructive knowledge, i.e., the plats and serial register pages, incorrectly show land as available for leasing, and the offeror possesses neither actual nor constructive knowledge that the records are in error, 4/ the acreage involved may be counted to determine whether the offeror has complied with the 640-acre rule. In the instant case, while the records before us do not conclusively establish when the plat and the serial register page were altered to reflect the fact that the SE 1/4 sec. 6 was included in lease A-13711, we will rely on appellant's assertions that they were not changed until after lease offer A-16802 was filed. BLM has offered no evidence to the contrary.

Therefore, we conclude that BLM improperly rejected appellant's offer as to the remaining 600 acres situated in secs. 9, 29, and 36, T. 7 N., R. 19 W., Gila and Salt River meridian, Arizona. Insofar as the decision rejected appellant's offer for the SE 1/4 sec. 6, T. 6 N., R. 19 W., it is affirmed.

4/ Thus, if some of the land applied for were withdrawn by a Public Land Order, duly published in the Federal Register, such land may not be counted regardless of whether the withdrawal was noted on the records, as the offeror would have constructive knowledge of the fact of withdrawal.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside and remanded in part.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

